

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

WHITTIER BUCHANAN
CDCR #K-02554,

Plaintiff,

vs.

E. GARZA; LUI FUGA; SILVIA
GARCIA; ELIAS CONTRERAS; RAY
BAKER; RICARDO LIMON; ANGEL
SALCEDO; GARY PEDERSON;
ANTHONY VERKOUTEREN;
JANE DOE; HODGE; STERLING;
NOLA GRANNIS; JOHN DOE;

Defendants.

Civil No. 08cv1290 BTM (WVG)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED
COMPLAINT PURSUANT TO
FED.R.CIV.P. 12(b) & 12(b)(6)**

[Doc. No. 60]

I. Procedural History

In this prisoner civil rights case, Whittier Buchanan ("Plaintiff"), is proceeding in pro se and *in forma pauperis* ("IFP") pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1915(a). Defendants Baker, Contreras, Fuga, Garcia, Garza, Limon, Pederson, Salcedo and Verkouteren filed a Motion to Dismiss Plaintiff's First Amendment Complaint ("FAC") pursuant to

1 FED.R.CIV.P. 12(b)(6) [Doc. No. 46]. On July 27, 2010, the Court granted in part, and denied
 2 in part, Defendants' Motion. (*See* July 27, 2010 Order at 11.) However, because the remaining
 3 Defendants, Antley, Grannis and Hodge, had only been recently served in this action, the Court
 4 informed Plaintiff to wait until the Court had ruled on Antley, Grannis and Hodge's separate
 5 Motion to Dismiss before moving forward. (*Id.* at 10.) The Court made clear to Plaintiff that
 6 Defendants Verkouteren, Garcia, Salcedo, Pederson and Contreras were dismissed from this
 7 action and Plaintiff could not amend his First Amended Complaint to contain claims against
 8 these Defendants. *Id.* at 4-5.

9 Currently before the Court is Defendants Antley, Grannis and Hodge's ("Defendants")
 10 Motion to Dismiss Plaintiff's First Amended Complaint pursuant to FED.R.CIV.P. 12(b) and
 11 12(b)(6) [Doc. No. 60.]¹ On August 23, 2010, Plaintiff filed his Opposition to which Defendants
 12 have not filed a Reply.

13 **II. Factual Background²**

14 In his First Amended Complaint, Plaintiff alleges that the events that gave rise to this
 15 action occurred while he was incarcerated at the Richard J. Donovan Correctional Facility
 16 ("RJD") from February 7, 2007 to October 23, 2007. (*See* FAC at 1.) In 2007, Plaintiff had a
 17 pending lawsuit against the California Substance Abuse Treatment Facility ("CSATF") for
 18 which he requested that Defendant Sterling, the Legal Technician Assistant, provide him with
 19 copies of legal documents. (*Id.* at 4.) Plaintiff claims that Defendant Sterling's "lack of legal
 20 assistance" caused Plaintiff to "miss his Court deadline." (*Id.*) Because he claims that Sterling's
 21 actions "hindered his efforts to process his legal claims," Plaintiff filed an administrative
 22 grievance against Sterling. (*Id.*)

23 Plaintiff claims that when Sterling became aware of Plaintiff's grievances, she began to
 24 lose or misplace Plaintiff's legal documents and refused him access to the prison law library.
 25 (*Id.*) As a result, Plaintiff's lawsuit was dismissed. (*Id.*)

26
 27 ¹ Plaintiff has also named John and Jane Does as Defendants in this matter but a review of the
 28 Court's docket indicates that these Defendants have yet to be properly identified or served in this matter.

29 ² The Court refers to the following facts based only on Plaintiff's version of the events as set
 forth in his First Amended Complaint.

1 Plaintiff further claims that Defendants Salcedo, Baker and Limon “were not supplying
 2 Plaintiff with indigent envelopes” so he filed an administrative grievance against Salcedo, Baker
 3 and Limon. (*Id.*) Plaintiff informed Salcedo that he had pending litigation which is why he
 4 needed the envelopes and requested her assistance to process his legal mail. (*Id.*) Because
 5 Salcedo refused to do so, Plaintiff filed another administrative grievance against Salcedo. (*Id.*)
 6 Plaintiff alleges that “in retaliation, Defendant Salcedo conspired with Defendants’ Baker and
 7 Limon” to not “pick up/process Plaintiff’s legal mail to the courts.” (*Id.*)

8 Defendant Verkouteren came to Plaintiff’s cell on June 3, 2007 to interview Plaintiff with
 9 respect to his administrative grievances regarding Salcedo, Baker and Limon. (*Id.* at 5.)
 10 Plaintiff alleges Defendant Verkouteren had Salcedo process one piece of Plaintiff’s legal mail
 11 but he also informed Plaintiff that if Plaintiff continued to file administrative grievances, the
 12 Defendants would continue to refuse to process his legal mail. (*Id.*) Plaintiff claims that these
 13 statements indicate a conspiracy between Verkouteren and the other defendants to retaliate
 14 against Plaintiff for filing administrative grievances against Salcedo, Baker and Limon. (*Id.*)

15 On May 30, 2007, Plaintiff was standing outside of the “program office” when Defendant
 16 Garza emerged from the office and “gave Plaintiff a direct order to ‘stop filing 602’s!’” When
 17 Plaintiff attempted to explain why he needed to file the grievances, Garza “abruptly cut Plaintiff
 18 off yelling ‘[racial explicative], you don’t have any rights, you are a criminal, criminals don’t
 19 have rights.’” (*Id.*) Garza continued to use racially derogatory language towards him. (*Id.*)
 20 Plaintiff claims Defendant Garza “yanked his [stick] from his waistbelt” and ordered Plaintiff
 21 to “get down.” (*Id.*) Plaintiff complied by laying down on his stomach at which time Garza
 22 ordered Defendant Fuga and “Jane Doe” to “cuff him.” (*Id.*) Plaintiff informed Defendants
 23 Fuga and Doe as they “began to jerk Plaintiff’s arms behind his back” that he had a medical
 24 chrono indicating that Plaintiff had a disability that provided for him to be handcuffed in the
 25 front and not behind his back due to a herniated disk. (*Id.*) Defendants Fuga and Doe ignored
 26 this information and were “kneeling Plaintiff roughly in his back, neck and the lower parts” of
 27 his body. (*Id.*) Plaintiff claims that a number of medical care employees and correctional
 28 officers observed this altercation but failed to protect him from injury.

1 Plaintiff cried out “you’re hurting me.” (*Id.* at 6.) “Upon hearing this, Defendant Garza
 2 gave Defendants Jane Doe and Fuga a direct order to ‘hurt him.’” (*Id.*) Plaintiff claims that
 3 Fuga and Doe “became even more malicious and sadistic” by “jerk[ing] twice on Plaintiff’s left
 4 arm” which resulted in an “audible popping sound.” (*Id.*) Plaintiff claims Defendant Garza
 5 continued to yell racial explicatives towards him and ordered Fuga and Doe to stand Plaintiff up.
 6 (*Id.*) As Plaintiff was crying, he claims that Defendant Garza “saw that he had actually
 7 ‘silenced’ Plaintiff” and ordered Fuga to take Plaintiff back to his cell. (*Id.*) Plaintiff asked
 8 Fuga to take him to the infirmary as he was in “extreme pain” but Fuga refused. Plaintiff
 9 contends that Garza, Fuga and Doe entered into a conspiracy to deprive him of his constitutional
 10 rights.

11 On August 16, 2007, Plaintiff claims that he was asked by Defendant Hodge to “snitch”
 12 on another inmate. (*Id.*) When Plaintiff refused, Hodge took Plaintiff’s prescription sunglasses.
 13 (*Id.*) Because Plaintiff continued to refuse to be a “snitch,” and due to the fact that Plaintiff filed
 14 a grievance against him, Hodge began acts of retaliation against Plaintiff. (*Id.*) Plaintiff claims
 15 that Hodge would take personal property from Plaintiff and give them to other inmates. (*Id.* at
 16 7.) Plaintiff alleges that Hodge would refuse to allow Plaintiff to attend church services or sing
 17 in the prison’s gospel choir. (*Id.*)

18 **III. DEFENDANTS MOTION TO DISMISS PURSUANT TO FED.R.CIV.P. 12(b)**

19 The Court will first consider Defendants Grannis and Sterling’s³ arguments that claims
 20 against them found in Plaintiff’s First Amended Complaint should be dismissed for failing to
 21 exhaust available administrative remedies pursuant to FED.R.CIV.P. 12(b) and 42 U.S.C.
 22 § 1997e(a).

23 **A. Standard of Review per FED.R.CIV.P. 12(b) and 42 U.S.C. § 1997e(a)**

24 Defendants Grannis and Sterling claim Plaintiff failed to exhaust available administrative
 25 remedies pursuant to 42 U.S.C. § 1997e(a) before bringing this suit, therefore, they seek
 26 dismissal under the “non-enumerated” provisions of FED.R.CIV.P. 12(b). The Ninth Circuit has
 27 held that “failure to exhaust nonjudicial remedies is a matter of abatement” not going to the

28 ³ Defendant Hodge does not join in the Motion to Dismiss Plaintiff’s claims against him based
 on failing to exhaust his administrative remedies

merits of the case and is properly raised pursuant to a motion to dismiss, including a non-enumerated motion under FED.R.CIV.P. 12(b). *See Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003) It is also well established that non-exhaustion of administrative remedies as set forth in 42 U.S.C. § 1997e(a) is an affirmative defense which defendant prison officials have the burden of raising and proving. *See Jones v. Bock*, 594 U.S. 199, 216 (2007); *Wyatt*, 315 F.3d at 1119. However, unlike under Rule 12(b)(6), “[i]n deciding a motion to dismiss for failure to exhaust nonjudicial remedies, the court may look beyond the pleadings and decide disputed issues of fact.” *Wyatt*, F.3d at 1120.

B. Exhaustion of Administrative Remedies per 42 U.S.C. § 1997e(a)

The Prison Litigation Reform Act (“PLRA”) amended 42 U.S.C. § 1997e(a) to provide that “[n]o action shall be brought with respect to prison conditions under section 1983 . . . by a prisoner confined in any jail, prison or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). “Once within the discretion of the district court, exhaustion in cases covered by § 1997e(a) is now mandatory.” *Porter v. Nussle*, 534 U.S. 516, 532 (2002). 42 U.S.C. § 1997e(a) has been construed broadly to “afford [] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case, *id.* at 525-26. Finally, “[t]he ‘available’ ‘remed[y]’ must be ‘exhausted’ before a complaint under § 1983 may be entertained,” “regardless of the relief offered through administrative procedures.” *Booth v. Churner*, 532 U.S. 731, 738, 741 (2001); *see also McKinney v. Carey*, 311 F.3d 1198, 1200-01 (9th Cir. 2002) (finding that prisoner’s civil rights action must be dismissed without prejudice unless prisoner exhausted available administrative remedies *before* he filed suit, even if he fully exhausts while the suit is pending).

The State of California provides its prisoners and parolees the right to administratively appeal “any departmental decision, action, condition or policy perceived by those individuals as adversely affecting their welfare.” CAL. CODE REGS., tit. 15 § 3084.1(a). In order to exhaust available administrative remedies within this system, a prisoner must proceed through several levels: (1) informal resolution, (2) formal written appeal on a CDC 602 inmate appeal form, (3) second level appeal to the institution head or designee, and (4) third level appeal to the Director

1 of the California Department of Corrections. *Barry v. Ratelle*, 985 F. Supp. 1235, 1237 (S.D.
 2 Cal. 1997) (citing CAL. CODE REGS. tit. 15 § 3084.5).

3 **C. Application of 42 U.S.C. § 1997e(a) to Plaintiff's Case**

4 Defendants argue that Plaintiff failed to exhaust his administrative remedies *prior* to
 5 filing this lawsuit. Defendants support their arguments with two separate declarations
 6 submitted by D. Foston, Chief of the Inmate Appeals Branch in Sacramento, California. (*See*
 7 D. Foston Declaration, Doc. Nos. 60-2 and 60-3.)

8 **1. Claims against Defendant Sterling**

9 Plaintiff alleges that Defendant Sterling was the "Legal Technical Assistant" at RJD. (*See*
 10 FAC at 4.) Plaintiff alleges that in 2007, Defendant Sterling failed to make copies of documents
 11 that were necessary to proceed in a separate action pending against the California Substance
 12 Abuse Treatment Facility. (*Id.*) As a result, Plaintiff's alleges that this separate action was
 13 dismissed. (*Id.*) Plaintiff claims that he submitted a grievance objecting to Sterling's actions
 14 which then caused Sterling to retaliate against Plaintiff. (*Id.*)

15 Defendants submit the declaration of Foston in which he indicates he reviewed the
 16 records at the Office of Inmate Appeals Branch for any and all grievances filed by Plaintiff
 17 relating to events that occurred while he was incarcerated at RJD. (*See* Foston Decl., Doc. No.
 18 60-3, at ¶ 8(a)-(b).) Foston declares that Plaintiff's only grievance related to his access to courts
 19 claim is one in which he claims that the RJD's Trust Account Office refused to supply Plaintiff
 20 with documents required by the Court to proceed *in forma pauperis* in his separate action against
 21 the CSATF. (*Id.* at ¶ 9(a), Ex. A., Director's Level Appeal Decision, Aug. 15, 2007, Log. No.
 22 RJD-07-520.)

23 In Plaintiff's Opposition, he submits a copy of an initial grievance which he claims
 24 relates to his allegations against Defendant Sterling. (*See* Pl.'s Opp'n, Ex. 3, Inmate/Parolee
 25 Appeal Form dated February 7, 2007, Log No. RJD 07-570.) In this grievance Plaintiff alleges
 26 that the RJD Trust Account Office had failed to send him the documents required by the Court
 27 in the Eastern District to proceed IFP. (*Id.*) As a result, Plaintiff states in this grievance that
 28 his "court action may be dismissed" if he does not receive these documents. (*Id.*) In addition,

1 Plaintiff states in his grievance that he should receive “priority use of the law library - but I hear
 2 that there isn’t one.” (*Id.*)

3 Plaintiff does not allege in his FAC that Defendant Sterling is employed in RJD’s Trust
 4 Account Office, nor does he allege that Defendant Sterling refused to give him priority status
 5 in the law library. These are the only two initial allegations in the grievance filed by Plaintiff that
 6 he claims in his Opposition relates to Defendant Sterling. The allegations in the grievances do
 7 not match the allegations in the First Amended Complaint against Defendant Sterling. Thus, the
 8 Court finds that Defendants have met their burden to show that Plaintiff did not exhaust his
 9 administrative remedies as to the claims against Defendant Sterling. Defendant Sterling’s
 10 Motion to Dismiss Plaintiff’s claims is granted for failing to exhaust his administrative remedies
 11 pursuant to 42 U.S.C. § 1997e.

12 **2. Claims against Defendant Grannis**

13 Defendants submit a second declaration from Foston to support their claim that Plaintiff
 14 failed to exhaust his available administrative remedies against Defendant Grannis, former Chief
 15 of Inmate Appeals Branch. (*See* Foston Decl., Doc. No. 60-2.) Foston declares that he has
 16 searched the records in the Office of the Inmate Appeals Branch which “revealed no third level
 17 appeals have been accepted for review by the Inmate Appeals Branch” relating to the claims
 18 against Defendant Grannis. (Foston Decl., Doc. No. 60-2, at ¶ 9.)

19 The claims against Defendant Grannis found in Plaintiff’s First Amended Complaint
 20 allege that she participated in a “conspiracy of retaliation” against Plaintiff and that she
 21 “acquiesced” to other Defendants “get tough” policies. (FAC at 12.) Defendants argue that
 22 Plaintiff did not submit any grievances relating to these claims. Plaintiff claims he did exhaust
 23 his administrative remedies as to Grannis and provides the Director’s Level Appeal Decision
 24 dated February 27, 2008 to support his claim. (*See* Pl.’s Opp’n, Ex. 1, Director’s Level Appeal
 25 Decision dated Feb. 27, 2008, Log No. RJD-07-02086.) In this response by Defendant Grannis,
 26 Plaintiff’s grievance against Defendant Hodge is denied. (*Id.*)

27 Plaintiff claims that his administrative appeal against Hodge was enough to make
 28 Defendant Grannis “‘alert’ to the nature of the wrongs.” (Pl.’s Opp’n at 10.) It is correct that

1 exhaustion does not require a “name-all-defendants” rule, as the Supreme Court has held that
 2 “exhaustion is not *per se* inadequate simply because an individual later sued was not named in
 3 the grievances.” *Jones*, 549 U.S. at 219. However, the Supreme Court also stated that the
 4 “primary purpose of a grievance is to alert prison officials to a problem.” *Id.* In the grievance
 5 responded to by Defendant Grannis, Plaintiff’s allegations are specific to the actions of
 6 Defendant Hodge. (See Pl.’s Opp’n, Ex. 1.) There are no allegations in Plaintiff’s grievances
 7 of a “conspiracy” or “get tough” policies involving any other correctional officer that would alert
 8 Defendant Grannis that she was directly involved in any of the alleged wrongdoings. Moreover,
 9 the Court has previously dismissed all of Plaintiff’s conspiracy claims against all Defendants.
 10 (See July 27, 2010 Order at 8-9.)

11 The Court finds that Defendant Grannis has met her burden to show that Plaintiff failed
 12 to exhaust his administrative remedies as to claims brought against her pursuant to 42 U.S.C.
 13 § 1997e.

14 The Court **GRANTS** Defendants Grannis and Sterling’s Motion to Dismiss Plaintiff’s
 15 First Amended Complaint for failing to exhaust his administrative remedies as required by 42
 16 U.S.C. § 1997e(a). Because the proper course of action is to dismiss all claims against these
 17 Defendants without prejudice to Plaintiff re-filing a separate action following proper exhaustion,
 18 the Court will not rule on the remaining arguments filed by these Defendants challenging the
 19 merits of Plaintiff’s claims.

20 **IV. Defendants’ Motion to Dismiss Plaintiff’s First Amended Complaint**

21 Because the Court has dismissed all the claims against Defendants Sterling and Grannis,
 22 the only remaining arguments are Defendant Hodge’s Motion to Dismiss Plaintiff’s claims for
 23 damages and dismissal of Plaintiff’s state law claims due to failure to comply with the California
 24 Government Claims Act.

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1 **A. FED.R.CIV.P. 12(b)(6) Standard of Review**

2 A Rule 12(b)(6) dismissal may be based on either a ““lack of a cognizable legal theory”
 3 or ‘the absence of sufficient facts alleged under a cognizable legal theory.”” *Johnson v.*
 4 *Riverside Healthcare System, LP*, 534 F.3d 1116, 1121-22 (9th Cir. 2008) (quoting *Balistreri*
 5 *v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990)). In other words, the plaintiff’s
 6 complaint must provide a “short and plain statement of the claim showing that [he] is entitled
 7 to relief.” *Id.* (citing FED.R.CIV.P. 8(a)(2)).

8 A motion to dismiss should be granted if plaintiff fails to proffer “enough facts to state
 9 a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570
 10 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the
 11 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”
 12 *Ashcroft v. Iqbal*, 556 U.S. ----, 129 S.Ct. 1937, 1949 (2009) .

13 In addition, factual allegations asserted by pro se petitioners, “however inartfully
 14 pleaded,” are held “to less stringent standards than formal pleadings drafted by lawyers.” *Haines*
 15 *v. Kerner*, 404 U.S. 519-20 (1972). Thus, where a plaintiff appears in propria persona in a civil
 16 rights case, the Court must construe the pleadings liberally and afford plaintiff any benefit of the
 17 doubt. *See Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 623 (9th Cir. 1988).

18 **B. Claims for Damages**

19 Defendant Hodge claims that Plaintiff cannot recover damages as a result of his alleged
 20 actions because Plaintiff has failed to allege any physical injury as required by 42 U.S.C.
 21 § 1997e(e). The claims that remain against Defendant Hodge arise from claims of retaliation.
 22 The PLRA states that “[n]o Federal civil action may be brought by a prisoner confined in a jail,
 23 prison, or other correctional facility, for mental or emotional injury suffered while in custody
 24 without a prior showing of physical injury.” 42 U.S.C. § 1997e(e). However, this provision
 25 does not apply to allegations of constitutional violations not premised on mental or emotional
 26 injury. *See Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998) (holding that 42 U.S.C.
 27 § 1997e(e), requiring a prior showing if physical injury, “does not apply to First Amendment
 28 claims regardless of the form of relief sought.”).

1 Plaintiff's retaliation claims are premised on a violation of his First Amendment rights
 2 and thus, the physical injury requirement of § 1997e(e) does not apply to these claims. *Id.*
 3 Defendant Hodge's Motion to Dismiss Plaintiff's claims for damages is **DENIED**.

4 **D. California Government Claims Act and Immunity under California Law**

5 Like the previous Defendants, Defendant Hodge moves to dismiss Plaintiff's state law
 6 claims on the grounds that he failed to comply with the requirements of the California
 7 Government Claims Act. Defendant Hodge argues that any state law claims based on Plaintiff's
 8 claims of retaliation, denial of access to the courts, or deliberate indifference must be dismissed
 9 because Plaintiff failed to submit administrative claims regarding these matters as required by
 10 CAL. GOVT. CODE § 945.4. The California Government Claims Act requires that a claim against
 11 a state employee be presented to the Victim Compensation and Government Claims Board
 12 ("VCGCB") no more than six months after the cause of action accrues. CAL. GOVT. CODE §
 13 945.6.

14 In support of his argument, Defendant Hodge has supplied the declaration of Susan
 15 Antley, the Deputy Attorney General assigned to represent Defendants in this matter. (*See*
 16 Declaration of Susan Antley.) In this declaration, Ms. Antley states that the Attorney General's
 17 office requested that the VCGCB provide documentation of any and all claims made by
 18 Plaintiff. (*Id.* at ¶ 3.)

19 The VCGCB supplied Ms. Antley with copies of two claims submitted by Plaintiff. (*Id.*,
 20 Exhibit "A.") In his First Amended Complaint, Plaintiff claims that Defendant Hodge retaliated
 21 against him because Plaintiff refused to "snitch" on an inmate Plaintiff claimed Defendant
 22 Hodge wanted to fire. (*See* FAC at 6.) According to the records attached to Ms. Antley's
 23 declaration, neither claim submitted by Plaintiff to the VCGCB relate in any way to the claims
 24 against Defendant Hodge. Plaintiff argues in his Opposition that he was physically unable to file
 25 claims against Defendant Hodge with the VCGCB because he suffered injuries as a result of
 26 retaliation by Defendants Garza, Fuga and Jane Doe due to filing grievances against Defendant
 27 Sterling. (*See* Pl.'s Opp'n at 11-12.)

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1 Plaintiff claims against Defendant Hodge arose in August of 2007. (*See* FAC at 6-7.)
 2 Plaintiff did submit a claim against Defendants Garza, Fuga, John Doe and Garcia with the
 3 VCGCB on September 14, 2007. (*See* Antley Decl., Ex. "A," Govt. Claims Form dated
 4 September 14, 2007.) There is no mention of the claims pertaining to Defendant Hodge in this
 5 claim. Moreover, Plaintiff provides no explanation as to why he was physically able to submit
 6 the claim against the other Defendants in the same time frame as his claims against Defendant
 7 Hodge arose. Plaintiff has provided no documentation to rebut Defendant Hodge's showing that
 8 he failed to present a claim to the VCGCB.

9 Therefore, Plaintiff's state law claims against Defendant Hodge are dismissed for failing
 10 to comply with CAL. GOVT. CODE § 945.4.

11 **IV. Remaining Claims and Remaining Defendants**

12 This is the second Motion to Dismiss filed in this action pertaining to Plaintiff's First
 13 Amended Complaint. As noted in the Court's previous Order, Defendants did not move to
 14 dismiss Plaintiff's First Amendment retaliation claims, Eighth Amendment excessive force
 15 claims, Eighth Amendment deliberate indifference to serious medical needs claims or Eighth
 16 Amendment failure to protect claims.

17 The Court informed Plaintiff that once there was an Order issued as to all Motions to
 18 Dismiss, Plaintiff would be provided the opportunity to: (1) file a Second Amended Complaint
 19 that corrects the deficiencies of pleading noted by the Court in its Orders; or (2) notify the Court
 20 that Plaintiff intends to proceed with the claims that survive the Defendants' Motion to Dismiss.
 21 Now that the Court has issued its rulings, Plaintiff has thirty (30) days to file his Second
 22 Amended Complaint or notify the Court that he is proceeding with the claims that remain.
 23 Plaintiff is cautioned that if he chooses to file an Amended Complaint, he may not rename or re-
 24 allege any claims relating to Defendants Verkouteren, Garcia, Pederson, Contreras, Sterling or
 25 Grannis. All the claims against these Defendants have been dismissed without prejudice to allow
 26 Plaintiff to re-file in a separate action once he has properly exhausted his administrative
 27 remedies.

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1 **VI. Conclusion and Order**

2 For all the foregoing reasons, the Court hereby:

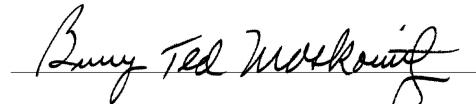
3 (1) **GRANTS** Defendants Sterling and Grannis' Motion to Dismiss all claims against
4 them without prejudice for failing to exhaust administrative remedies pursuant to 42 U.S.C.
5 § 1997e. Because there are no remaining claims against these Defendants, and there is no just
6 reason for delay, the Clerk of Court is directed to enter a final judgment, without prejudice, as
7 to Defendants Sterling and Grannis pursuant to FED.R.CIV.P. 54(b).

8 (2) **DENIES** Defendant Hodge's Motion to Dismiss Plaintiff's claim for damages; and

9 (3) **GRANTS** Defendants Hodge's Motion to Dismiss Plaintiff's state law claims
10 against him for failing to comply with the requirements of the California Government Claims
11 Act.

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13 DATED: October 14, 2010



14
15 Honorable Barry Ted Moskowitz
16 United States District Judge

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